IN THE

Supreme Court of the United States

October Term, ~~1948~~ 1949

~~No. 818~~ 28

JOHN WALTER OAKLEY, JR.

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

~~No. 819~~ 29

JOHN S. HAYNES

vs.

SOUTHERN RAILWAY SYSTEM

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF INTERVENING DEFENDANTS-RESPONDENTS IN OPPOSITION

JAMES PARK,
602 Bank of Commerce Building, Lexington, Kentucky,
FRANK L. MULHOLLAND,
741 Nicholas Building, Toledo, Ohio,
CLARENCE M. MULHOLLAND,
741 Nicholas Building, Toledo, Ohio,
WILLARD H. McEWEN,
741 Nicholas Building, Toledo, Ohio,
Attorneys for Intervening Defendants-Respondents, System Federation No. 21 and System Federation No. 91, both of the Railway Employes' Department, A. F. of L.

Of Counsel:
STOLL, TOWNSEND, PARK, MOHNEY & DAVIS,
602 Bank of Commerce Building,
Lexington, Kentucky,
MULHOLLAND, ROBIE & McEWEN,
741 Nicholas Building, Toledo, Ohio.

Dated at Toledo, Ohio, March 24, 1949.

IN THE

Supreme Court of the United States

October Term, 1948

No. 578

JOHN WALTER OAKLEY, JR.

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

No. 579

JOHN S. HAYNES

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Of Counsel:
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Opinions Below

The opinion of the United States District Court for the Eastern District of Kentucky, at London, in *John Walter Oakley, Jr., vs. Louisville & Nashville Railroad Co.* (OR. 24)[1] is not officially reported. The opinion of the United States Court of Appeals for the Sixth Circuit (OR. 28-31) is reported at 170 F. (2d) 1008. The opinion of the United States District Court for the Eastern District of

[1] Reference to the record in *John Walter Oakley, Jr., vs. Louisville & Nashville Railroad Co.*, will be indicated by "OR." and in *John S. Haynes vs. Southern Railway System*, by "HR."

Kentucky, at London, in *John S. Haynes vs. Southern Railway System* (HR. 22) is not officially reported. The opinion of the United States Court of Appeals for the Sixth Circuit (HR. 26) is reported at 171 F. (2d) 128.

Jurisdiction

The judgments of the United States Court of Appeals for the Sixth Circuit in *John Walter Oakley, Jr., vs. Louisville and Nashville Railroad Co.* (OR. 28) and in *John S. Haynes vs. Southern Railway System* (HR. 26) were entered on November 22, 1948. The petition for writs of *certiorari* was filed on February 19, 1949, and notice of the filing thereof was served upon counsel for the intervening defendants-respondents on March 5, 1949. The petitioners invoke the jurisdiction of this Court under 28 U. S. C. 1254(1).

Counter Statement of Questions Presented

Whether the employment status and seniority to which a veteran claims to be entitled by virtue of Section 8 of the Selective Training and Service Act of 1940, as amended, are of indefinite duration, when the claimed status and seniority are superior to and inconsistent with the status and seniority to which he is entitled under contractual provisions generally applicable to employees similarly situated; or whether the right to such alleged statutory status and seniority terminates upon the expiration of the first year of the veteran's reemployment, leaving his status and seniority to be determined thereafter in the light of contractual provisions applicable to veterans and non-veterans alike.

Statement

In each of the cases presented, the petitioner is an honorably discharged veteran of World War II who sought

reemployment in his former position pursuant to the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U. S. C. App. Sec. 301 *et seq.*, amended 56 Stat. 724, 58 Stat. 598). The facts in the two cases are similar in that in each instance, the petitioner was reemployed in precisely the same position, and with the same seniority date (thus receiving "accumulated seniority" for the period spent in the armed forces, as that which he left to enter the armed forces. Both petitioners, however, sought in these actions to obtain different positions which they assert they would have applied for and received had they not entered the armed forces, with the seniority dates in such different positions which they would have been given had they thus applied for and received such positions.

John Walter Oakley, Jr., the petitioner in No. 578, was employed by respondent Louisville & Nashville Railroad Company as a machinist at Loyall, Kentucky, with a seniority date of July 6, 1943, at the time he entered the armed forces. Upon his return and reemployment, he was given the same classification and seniority at Loyall, but there being insufficient work at that point to entitle one with his seniority to active employment, his status in the restored position was that of a furloughed employee. However, under the provisions of an agreement with respondent System Federation No. 91, he was able to transfer immediately to Corbin, Kentucky, where machinists were needed, and still retain his right to be recalled to Loyall in accordance with his seniority there. (OR. 7.) He was employed as a machinist at Corbin on July 17, 1946, with seniority at that point as of that date, and he retained that position for more than a year thereafter. He alleges that had he not entered the armed forces, he would have effected such transfer on July 1, 1945, and the only relief sought in this

action is that he be accorded seniority as of that date at Corbin.

The seniority right thus asserted by Oakley is predicated entirely on the Selective Training and Service Act. Under the seniority system established by collective bargaining agreements between the Railroad Company and the System Federation, seniority dates from the time the employee starts to work at the point of employment, and is limited to that point. (OR. 8.) There is no allegation or proof of any arrangement, by contract express or implied, whereby employees returning from furlough or leave of absence were entitled to receive a retroactive seniority date such as that which Oakley claims by reason of the Act.

John S. Haynes, the petitioner in No. 579, left a position as machinist helper in the employ of respondent Southern Railway System to enter the armed forces, and upon his return he was reemployed in the same classification, and continued to work as a machinist helper for more than a year after his reemployment. During his absence in the armed forces several other machinist helpers with less seniority as such than Haynes had secured positions as helper apprentices. In this action, filed more than a year after his reemployment, Haynes sought a decree ordering respondent Southern Railway System to accord him a position as helper apprentice, with seniority in that classification dating from February 1, 1943, the time he alleges he would have received such a position had he not entered the armed forces.

The position and seniority thus sought by Haynes is also predicated entirely upon the provisions of the Selective Training and Service Act. There is no allegation or proof of any contractual provision entitling him to the position of helper apprentice or to any retroactive seniority therein. There is no allegation or proof that machinist

helpers returning from furlough or leave of absence were entitled, by contract express or implied, to be given positions and seniority as helper apprentices which they could or would have received had they not been absent.

Both the District Court and the Court of Appeals took the view that in each case the petitioner's right to the position and senority claimed, if it existed at all, was a special statutory right, and that its duration was limited to one year after the date of petitioner's reemployment. Accordingly both actions were dismissed, since the relief sought would require the granting of the position and seniority claimed after the expiration of the one-year period. In neither case did the courts below pass upon the question of whether during the one-year period the Selective Training and Service Act did confer upon petitioner the rights claimed.

Argument

Any discussion of the question of the duration of the rights sought to be enforced in these actions necessarily involves the tacit assumption that such rights actually existed. However, as we have pointed out, the courts below did not have any occasion to determine whether these alleged rights existed during the one-year period in question, but merely concluded that whether or not they existed, they could not be enforced for more than one year. Had these cases reached the stage of a hearing on the merits, it would have been our position that no such rights as those asserted by petitioners are conferred by the Selective Training and Service Act, and nothing contained in this brief is intended as a waiver of this position.

The judgments of the Court of Appeals below in these two cases stand simply for the proposition that an employment status and seniority which a veteran claims by virtue of the Selective Training and Service Act only, and to

which neither veteran nor non-veteran employees similarly situated would be entitled as a matter of contract, are not required by the Act to be accorded to the veteran after the expiration of one year from the date of his reemployment. These judgments were based squarely upon the decision of this Court in the case of *Trailmobile Co. vs. Whirls,* 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 1328, where the Court answered in the negative the question of "* * * whether under Section 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues." (331 U. S., at 51.)

Our reason for opposing the petition for writs of certiorari in the instant cases is that we believe that it presents precisely the same issue as that already determined by this Court in the *Trailmobile* case, *supra.* The employment rights of a returning veteran must necessarily fall into one or the other of two classes, *ie.,* (1) the contractual rights and incidents of the restored position, or (2) rights which depend for their existence on the statute alone. In the *Trailmobile case,* the veteran, Whirls, claimed that the statute preserved for him indefinitely a status to which he had ceased to be entitled insofar as his contractual rights were concerned. In the instant cases, the veterans Oakley and Haynes assert that the statutory status claimed by them is of indefinite duration, even though they never were entitled to that status as a matter of contractual rights. The only difference between the cases is that in the *Trailmobile case,* Whirls had been entitled to the status claimed by him as a matter of contract right for more than one year after his reemployment, whereas in the instant cases Oakley and Haynes have never been entitled to the status claimed by them as a matter of contract right.

Contrary to the argument advanced by petitioners here, the judgments of the court below do not stand for the

proposition that all of the veteran's employment rights terminate in one year after his reemployment, or that after the one year he may be made the victim of discrimination in favor of non-veterans. There is no discrimination involved in these cases. Oakley and Haynes were asserting rights not possessed by non-veteran employees similarly situated,[2] and the Court merely held that if the Selective Training and Service Act gave them such a preferred standing, that statutory preference was limited to one year's duration. This does not mean that at the expiration of the one-year period Oakley and Haynes automatically lost employment rights which they shared with other employees by reason of the provisions of the contracts governing their employment; but no loss or denial of such contractual rights has been claimed in these actions.

Nor do the judgments below stand for the proposition that upon the expiration of one year after his reemployment, the veteran may no longer recover for failure to accord him rights to which he may have been entitled within the one-year period.

Insofar as petitioner Oakley is concerned, the only relief sought by him was that he be accorded seniority as a machinist at Corbin, Kentucky, dating from July 1, 1945. He does not claim to have suffered any monetary loss by reason of the failure to accord him this seniority date during the one-year period in question, and hence has shown no grounds for any recovery based on such failure.

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[2] It is obvious that the only non-veteran employees who could be similarly situated would be those employees returning to active service after a leave of absence from positions similar to those held by Oakley and Haynes when they entered the armed forces. There is no allegation or proof that such employees were accorded the right to retroactive seniority in positions which had been awarded to other employees during their absence, and in fact quite the contrary appears. That Congress approved this basis for determining which non-veteran employees were "similarly situated" is evidenced by the provision, in Section 8(c) of the Act, that "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service.* * * *" (Emphasis supplied.)

It would appear that insofar as the allegations of his complaint are concerned, petitioner Haynes did claim to have suffered some slight monetary damage within the one-year period. However, this claim formed no part of the basis on which Haynes appealed from the decision of the District Court, nor was this aspect of the case argued before the Court of Appeals below, or mentioned in that Court's opinion. In view of this background, it cannot be claimed that the judgment of the court below stands for the proposition that the denial of a veteran's statutory rights, whatever they may be, within the one-year period, may not constitute the basis for an award of monetary damages after the expiration of that period. And since the question of the monetary damage claimed by Haynes was never raised before the Court of Appeals, we do not believe that it may properly be presented to this Court as the basis for issuance of a writ of *certiorari*.

Conclusion

For the reasons stated above, we believe that the decisions below are correct and in accord with applicable decisions of this Court. It is therefore respectfully submitted that the petition for writs of *certiorari* should be denied.

Respectfully submitted,

JAMES PARK,
602 Bank of Commerce Building,
Lexington, Kentucky,

FRANK L. MULHOLLAND,
741 Nicholas Building, Toledo, Ohio,

CLARENCE M. MULHOLLAND,
741 Nicholas Building, Toledo, Ohio,

WILLARD H. McEWEN,
741 Nicholas Building, Toledo, Ohio,
Attorneys for Intervening Defendants-Respondents, System Federation No. 21 and System Federation No. 91, both of the Railway Employes' Department, A. F. of L.

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Lexington, Kentucky.
MULHOLLAND, ROBIE & McEWEN,
741 Nicholas Building, Toledo, Ohio.
Dated at Toledo, Ohio, March 24, 1949.

Certificate of Service

I hereby certify that I have served the foregoing document upon all parties of record herein on the 24th day of March, 1949, by mailing a copy thereof to the Solicitor General of the United States, counsel for petitioners John Walter Oakley, Jr., and John S. Haynes; Mr. Carl M. Jacobs, Mr. Cornelius J. Petzhold, and Mr. W. S. Macgill counsel for respondent Cincinnati, New Orleans and Texas-Pacific Railway Company (Southern Railway System); and Mr. C. S. Landrum and Mr. H. T. Lively, counsel for respondent Louisville & Nashville Railroad Co.

CLARENCE M. MULHOLLAND.